United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Docket No. 74-1733

To be argued by
Stanley L. Kantor

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

74-1733

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UNITED STATES OF AMERICA ex rel.
JOSE GONZALEZ,

Petitioner-Appellant,

-against-

HON. J. E. LaVALLEE, Superintendent
Clinton Correctional Facility, Dannemora,
New York,

Respondent-Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

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Preliminary Statement

Petitioner-Appellant ['Petitioner'] has appealed to this Court from an order of the United States Court for the Southern District of New York (Pierce, D.J.), dated April 1, 1974, denying, without a hearing, petitioner's application for a writ of habeas corpus and dismissing the petition. By order dated May 21, 1974, the District Court granted petitioner's application, under 28 U.S.C. § 2253, for a certificate of probable cause.

By order of this Court (Feinberg, J.) dated June 6, 1974, petitioner's application to proceed in forma pauperis, and for assignment of counsel was granted, and a briefing schedule was established. This schedule was twice amended at the request of counsel.

Questions Presented

1. Were petitioner's Fourth Amendment rights violated by the activities of the police on October 28, 1970?

2. Assuming arguendo that the use and admission of the seized paraphenalia was error, was it harmless beyond a reasonable doubt?

3. Does the record in this case support petitioner's barebones claim that the police exploited petitioner's loitering arrest to the extent of remanding the hearing?

Statement of Facts

Petitioner is incarcerated at Clinton Correctional Facility as a result of a conviction in Supreme Court, Bronx County (Greenfield, J.S.C.) of criminal possession of a dangerous drug in the first degree and criminal possession of a dangerous drug in the third degree (Penal L. §§ 220.20, 220.30). (T. 18).* Petitioner having been found guilty, was sentenced on April 19, 1971, to a term of from 20 years to life imprisonment on the first count and an indeterminate term of five years on the second count (S. 4,7).** The two sentences are running concurrently (Id.).

Petitioner appealed his conviction to the Appellate Division of the Supreme Court, which on March 14, 1972 affirmed (two justices dissenting). People v. Gonzalez, 38 A D 2d 912 (1st Dept., 1972). On November 30, 1972, the New York Court of Appeals, without opinion, also affirmed. People v. Gonzalez, 31 N Y 2d 787 (1972). The Supreme Court denied petitioner's application for a writ of certiorari on March 19, 1973. Gonzalez v. New York, 410 U.S. 988 (1973).

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* Numbers in parentheses preceded by the letter "T" refer to pages of the trial transcript.

** Numbers in parentheses preceded by the letter "S" refer to pages of sentencing transcript.

A. The Mapp and Huntley Hearings

Prior to trial a hearing was held in Supreme Court, Bronx County (Dickens, J.S.C.) on the issue of whether the evidence seized in petitioner's apartment should be suppressed. N.Y. Code of Cr. Pro. § 813-f so-called Mapp hearing (H.3).* The only witness at the Mapp hearing as at the Huntley hearing held the following day was Patrolman James A. Jones of the Narcotics Enforcement Unit of the City Police Department.

Jones testified that while on patrol, two weeks before the arrest he was approached by a confidential but "unregistered" informant and told him that he (the informant) could show Jones "a guy that's doing heavy dealings in the neighborhood". (H.5). The informant was then invited into the plainclothesman's car, and drove "around" (H.5). When they came to 174th Street and Bathgate Avenue in the Bronx, the informant pointed out petitioner, who was then standing on the corner speaking with another unidentified man.

No attempt was made at that point to try and apprehend petitioner, rather, Jones, after briefly questioning the informer as to the basis for his knowledge, took him to a

* Letters in parentheses preceded by the letter "H" refer to the pages of the transcript of petitioner's Mapp and Huntley suppression hearing.

predetermined spot, and let him go (H.6). In the course of questioning the informant, Officer Jones learned that the informant had had dealings with petitioner before, and that he used to be employed by him "bagging" and "cutting" heroin. The officer also learned that petitioner worked out of an apartment at 1664 Grand Avenue in the Bronx and that his girlfriend and another fellow worked with him at the apartment (H.7-8).

On the day of the arrest, October 28, 1970, Officer Jones, this time accompanied by Sergeant Markman and Officer DePaolis, again met with this same informant, who advised him that petitioner (referred to as 'Jose') had been arrested and that then was the best time to go over to his house (H.8). The informant also stated that time was of the essence as "'[h]e's in jail. He might be back'", and that just his girlfriend was there now, guarding the heroin (H.8-9).

At approximately 4:00 p.m. Officer Jones, dressed in plainclothes, went to the basement door of 1664 Grand Avenue while Officer DePaolis went around to the rear of the building and Sergeant Markman protected the front of the building. Officer Jones knocked on the apartment door, which was answered by petitioner's girlfriend, one Antonia Rios. When asked through the closed door, who it was, the officer stated that it was "Tony" and that "Jose" said it was "okay" for him to come around. (H.9-10).

The door was then opened, and the officer admitted to the kitchen area of the apartment. When asked what he wanted, he replied that Jose said it was okay for him to come

around and buy "ten half loads".* (H.10-11). Rios then asked the officer to wait a minute and went into the back room. Shortly afterwards, she came out of the room with one Luis Moran, who looked at Jones and gave Rios a cryptic "okay". Both Rios and Moran then returned to the back room, and Rios returned with a carton containing one half-load, saying "that's all I have right now". The officer accepted the heroin, gave her $25.00 and then put her under arrest. (H.11). He then escorted her into the back room where he found Moran sitting on the bed at a dresser, putting what appeared to be heroin into glassine envelopes. The two of them were handcuffed together and Sergeant Markman and Officer DePaolis were let into the apartment. (H.11-12).

Prior to that, Jones had observed 9 bags of white powder and $543 on bedroom dresser, and two cans of milk powder used to cut heroin for street use. In addition he found a suitcase in the bedroom closet containing "cutting paraphenalia" (H.12).

Both Rios and Moran were then warned of their rights (id.). Subsequent to the warnings Rios told Jones, without prompting that "Everything in the apartment belongs to Jose".

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* A half-load, according to the witness consists of fifteen glassine envelopes containing heroin (H.10).

In response to that, Sergeant Markman, who also heard the statement said that we would wait for him. Rios replied that petitioner should return any minute "now".

At approximately 4:45 p.m. petitioner returned to the apartment, accompanied by two others, Rivera and Gonzalez. At first there was a knock on the door, at which point Officer Jones and Sergeant Markman went to the front door. Before Jones could open the door, a key went into the lock, and the latch turned. As the door opened, Officer Jones, according to his testimony, saw petitioner opening the door, and returning the key to his pocket (H.15-16). Petitioner and his associates, Rivera and Gonzalez were placed under arrest, patted them down, and in petitioner's front trouser pocket, was found one plastic bag containing heroin, and in his hand was a brown paper bag containing five boxes of empty glassine envelopes (H.15-17).

Subsequently, after advising petitioner of his rights, petitioner approached Officer Jones and asked to speak with him for a minute. The two men, along with Sergeant Markman, went into the kitchen, whereupon petitioner, concerned that his confederates be let free, stated to the police officer:

> "Everything belongs to me . . . well, all the stuff you found in the apartment belongs to me. All the glassine envelopes, and everything, belongs to me, the heroin . . . You should let the other people go because they have nothing on them." (H.18).

Petitioner also admitted ownership of a sum of money amounting to $543.00 (H.23). The landlady, a Mrs. Ashby, identified petitioner to the police as the individual who had rented the apartment on September 19, 1970, using the alias Carlos Rangel (H.25).

On cross-examination, Jones testified, that the October 14th date was the first time the informant had given him any information, and that the officer had no way of knowing, at that time, whether or not the information was reliable (H.26). He met the informant, on the October 14th date as a result of his calling the office and informing the police that he had information for them, and that they were to meet him in "the neighborhood" (H.27-8).

On the October 28th date, in addition to learning from the informant that petitioner had been arrested and was probably in jail, the informant also suggested that now was the best time to go around and try to make a buy (H.31-2). The officer, at that time, did not expect to see or arrest

petitioner, and he had no way of knowing whether at any particular time, petitioner would have any narcotics on him (H.33).

The police, according to Jones' testimony did not immediately take Rios and Moran to the station house, because they learned from Rios that petitioner would be back shortly (H.35-6). As a result of this information, the police decided to wait from thirty minutes to an hour and if petitioner did not return by that time, they were going to confiscate everything in the apartment pertaining to narcotics and take it and them to the station house to effectuate the arrest. Approximately forty-five minutes later, petitioner was arrested upon entering the apartment (H.39). Petitioner was arrested for possession of the contraband.

The officer further explained that he could not apply for a search warrant based upon what his informant had told him because "If he has made prior arrests, if you have used him to make prior arrests, you apply for a search warrant" (H.45).

At the conclusion of the officer's testimony both the People and petitioner rested. In arguing that the evidence be suppressed, petitioner's counsel stated (H.49):

> "... that the evidence to be used against this defendant be suppressed on the following grounds: One, I maintain that there is no probable cause for the officer making the arrest originally on this defendant. He came into that apartment . . . and didn't know it was his apartment. Secondly, believed the man had been in jail. Thirdly, cannot associate him with any of the contraband in that apartment, except from someone who he just arrested and might have said anything to get out of the arrest, a co-conspirator."

The Court denied petitioner's motion to suppress, explaining (H.50):

> "The defendant has the burden of proof in these cases. The People have the burden of going forward in the first instance, and then the defendant has the burden of proof, showing that he wasn't connected with this. I don't think the defendant has lived up to his burden."

The following day a "Huntley"* hearing was held.

Again the sole witness was Officer Jones. He testified that after arresting petitioner, he gave him his Miranda warnings. After giving him his warnings Jones asked him if he wanted to say anything now without his attorney, to which petitioner replied that he did not (H.53-4). He also declined the offer to contact an attorney (Id.).

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* People v. Huntley, 15 N Y 2d 72 (1965).

Fifteen minutes later, petitioner, after being told that he was under arrest for possession of narcotics and informed him of what had been found in the apartment, he admitted ownership of everything in the apartment (H.59-60).

At the conclusion of the hearing the Court found that the confession had been voluntary beyond a reasonable doubt (H.63).

B. The Trial

Trial commenced in Supreme Court, Bronx County before Hon. Abraham Greenfield and a jury on March 3, 1971* (T.17). After opening statements by both sides, defendant indicating that the defense would be based on the absence of actual possession and that in any event, petitioner was improperly charged with two counts, but should have only been charged with a single count, Patrolman Jones was again called to the stand (T.25-26).

After testifying to his training and experience in narcotics law enforcement, Officer Jones again, this time for

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* The first trial day was taken up with selection of the jury and disposition of petitioner's application to proceed in forma pauperis (T.1-16).

the jury, traveled the odyssey conducted on October 28, 1970, some six months before (T.26-7).

The officer testified that on the day of petitioner's arrest, he went to 1664 Grand Avenue while operating in an undercover capacity, to see if he could "make a buy" (T.28). The officer was invited into the apartment, where he observed nine bags of white powder sitting on the dresser in the combination livingroom-bedroom, along with an amount of currency (T.31,32,33). In the course of looking through the apartment on the floor under the kitchen table, the officer discovered a brown shopping bag containing two cans of white powder and inside the bedroom closet, he found a suitcase containing a scale, plastic bags, glassine envelopes, scissors, measuring spoons, strainers, scotch tape, all of which were used to prepare heroin for distribution (T.32).

After completing the arrest of the two occupants of the apartment, the witness gathered the narcotics and other material he had found and placed them on the kitchen table and was guarding them (T.34). Approximately forty-five minutes after entering the apartment, there was a knock on the door, and upon hearing the knock, the officer stationed himself by the door and observed a key going in and the door latch being opened. According to his testimony the officer then jerked open the door and observed Jose Gonzalez, along with Luis Rivera and Alberto Gonzalez (T.34).

The officer had his shield and his revolver out and said "Come in. You are under arrest, Jose". Petitioner stepped inside and was placed under arrest (T.35). He was then searched and in his pocket was a plastic bag containing white powder, and in his hand was a brown paper bag containing five boxes of glassine envelopes, or approximately 4200 glassine envelopes (T.35). Petitioner was then apprised of his rights. Petitioner, when asked if he wished to make a statement, declined to do so at that time (T.36).

Petitioner was then taken from the entranceway to the bedroom, with the four others already there.

Patrolman DePaolis, then left the room to call for radio-car assistance, returning about fifteen minutes later. While waiting for the prowl car to arrive, Officer DePaolis was guarding the prisoners while Sergeant Markman and the witness were in the kitchen watching the seized contraband (T.36). Petitioner then asked if he could speak with Officer Jones (T.36). The officer took off his handcuffs, and petitioner came into the kitchen area (T.36-7). Before however he was permitted to say anything, he was again given his "Miranda" warnings and asked if he wanted his lawyer here now (T.37). Petitioner answered that he didn't need his lawyer.

Thereupon petitioner, facing the seized contraband, stated "everything in the apartment is mine. Doesn't belong to any of them. It's mines" (T.37). Petitioner also volunteered that the money was his as well (T.37).

Subsequently in the holding cell at the 44th precinct, petitioner reiterated his statement, stating (T.38):

> "Listen, I thought you was going to let these people go. I told you everything was mines [sic]. What are you holding them for?"

Officer Jones then took all the seized contraband to the police laboratory for analysis (T.39). The evidence seized from the dresser top, the nine bags of heroin and the five glassine envelopes, also containing heroin were introduced, and the currency was admitted in evidence. The items seized from under the kitchen table were also introduced (T.44-5), and then the material found in the closet was also introduced (T.46). Finally, the material taken from petitioner's person was also introduced (T.47).

On cross-examination, the witness stated that he did not take the key, but rather the key was given by petitioner to his associate Antonia Rios, who them gave it to the landlady (T.49).* He also stated that he never saw petitioner touch any of the evidence seized at the apartment (T.56).

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* So that, according to the testimony, petitioner's dog could be fed.

When asked when prior to the date of the arrest he had seen petitioner, the officer stated that he had seen petitioner for approximately ten minutes from approximately forty feet away on October 14, 1970 (T.59-60). The witness also stated at the moment petitioner entered the apartment he effected the arrest (T.60).

The next witness was Sergeant Michael Markman, also of the Narcotics Enforcement unit of the City police department. After setting forth his training and experience, Sergeant Markman, related his version of the events of October 28, 1971 (T.77-8). Sergeant Markman's testimony tallied exactly with that of Patrolman Jones (T.78-83).

On cross-examination, he testified that after he entered the apartment, they decided to wait for petitioner to return and turned on the television so as to make the house look normal, placing Rios and Moran on the bed, watching television (T.85).

After Sergeant Markman's testimony was concluded, the prosecution called Officer Lawrence DiPaolis, also of the Narcotics Enforcement unit of the City police department (T.96). After relating his training and experience as a police

officer in narcotics enforcement, he also related to the jury the events of October 28, 1970. His testimony also tallied exactly with that of Officer Jones and Sergeant Markman (T.98-101).

The next witness was Geraldine Ashby, the owner of the house located at 1664 Grand Avenue in the Bronx (T.112-3). She described the house, which she had, at that point, owned for two years, as a two-family brick house (T.113). She further testified that the basement apartment was, on October 28, 1970, rented to one Carlos Rangel and had been rented to him since October 1st of that year (T.113-4); and that he lived there with his wife (T.114). She further identified petitioner as the lessee.

On cross-examination, she stated that she had visited the apartment four times and that petitioner and his "wife"* appeared to be neat and clean, but their friend** was always bothering her for "one thing or another" (T.117-119).

The next and final prosecution witness was Officer Otis Harrison, a chemist in the City police department laboratory (T.119).

After testifying to his training duties and experience (T.119-21), he testified as to the analysis done on the nine

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* Antonia Rios
** Apparently Luis Moran

clear bags and that the total weight was 27-3/4 ounces, plus 344 grains (T.124), that seven of the nine bags contained heroin and the remaining two did not contain any dangerous drugs (T.124). The five glassine envelopes contained ten grams of heroin (T.124). The two containers contained a white powder, and no dangerous drugs were detected (T.126). He also analyzed the paraphenalia and found no dangerous drugs present except a trace of heroin on the spoon (T.128). Finally, he analyzed the material taken from petitioner upon his arrest and stated that the contents contained heroin and the total weight was 3-1/2 ounces, 65 grains. Based upon Officer Harrison's analysis, the evidence was, over petitioner's objection, received in evidence (T.146-7).

On cross-examination, the officer testified that the heroin found contained a higher percentage of the actual drug than would normally be found in mixtures ready for "street use" and that, depending on how much it was cut, the amount could be converted into approximately 5,000 bags (T.147-8).

At the close of the prosecution's case, petitioner moved to dismiss the indictment on the grounds that no prima facie case had been made concerning possession of the drugs and that in any event, the two counts should be merged (T.150-1). The court finding that actual and constructive possession were viable theories, denied the motions (T.152-3).

Petitioner's only witness was Luis Rivera, petitioner's brother-in-law -- his sister's husband (T.159-160). The witness had never been convicted of using drugs (T.161). Rivera testified, after being formally apprised by the Court, of his Fifth Amendment rights, testified that he was with petitioner at 2:30 in the afternoon when they went to the Grand Avenue address so that petitioner, who had been staying with Rivera could get some clothes (T.162-3). He stated that Gonzalez knocked on the door, the officers opened it, "pushed" the three men into the apartment, arrested and then searched them (T.164). The witness stated that Gonzalez did not have a key, that he [Rivera] knew of. He also attempted to cast doubt on the officer's testimony by stating that petitioner did not talk with them privately while he was there (T.167). Approximately two hours after they entered the apartment, at 4:30 the five of them were taken to the precinct (T.168).

On cross-examination, the witness stated that petitioner and Antonia Rios lived there (T.172). He also testified that while he had taken a dose of heroin on that day, he was alert and aware at all times (T.174).

With the conclusion of this witness' testimony, petitioner rested, without taking the stand (T.175).

After summations for both sides, and the Court's charge (T.176-237), the jury, at 1:20 p.m. retired to deliberate. At 3:15 p.m. the jury returned with their verdict, finding petitioner guilty of both counts in the indictment (T.242-3).

On April 19, 1971, petitioner was sentenced by the Court (Greenfield, J.) to a term of twenty years to life imprisonment on the first count and an indeterminate five year term on the second count (S.7), the sentences are running concurrently (Id.).

Opinion Below

The decision of the District Court is unreported and is included in petitioner's appendix (A.3-A.10). The Court in dismissing the petition, found that all issues were ripe for review, but that none were meritorious. See U.S. ex rel. Gibbs v. Zelker, 496 F. 2d 991 (2d Cir., 1974); Mercado v. Rockefeller, ___ F. 2d ___ (Dkt. No. 73-2120, 8/15/74) (2d Cir. Slip Op. 5189).

The Court, first of all, disposes of petitioner's contention that his loitering arrest was a sham (Point V) so as to allow the police officers to gain entry. As the court points out, there is no evidence whatsoever to support this rather absurd contention.

The Court then analyzes the entire transaction finding each step along the way a legitimate one (A.7). As the officers did not have a sufficient basis upon which to obtain a search warrant, they resorted to a legitimate subtrefuge to gain entry: they moreover had some basis for believing that Miss Rios was there and would sell them heroin. She in fact did commit the felony in their presence and therefore furnished probable cause to arrest her (Id.). In the process, under the Court's analysis, of effecting the arrests, the officers saw a considerable quantity of what appeared to them to be heroin and other narcotics paraphenalia. This in open view. Therefore they acted properly in seizing that evidence.

The Court then deals with the issue of the milk sugar found under the kitchen table, and the cutting paraphenalia found in the suitcase in the bedroom-livingroom closet (A.8-9).

The Court first rejects as patently incredible assertion that the milk sugar (lactose) either tainted the impermissibly seized evidence; or prejudiced petitioner at trial. As to the first point, the Court states:

> "If the improperly discovered items had not been seized, petitioner would have still been confronted with the fifteen glassine bags of heroin which Ms. Rios had sold to the police officer; and seven clear bags of heroin, containing 28 ounces; five more glassine envelopes; and $543 in cash and the spectre of Ms. Rios and Moran under arrest. Given all these circumstances, it is specious to argue the addition of milk sugar and more narcotics paraphenalia are the factors which elicited the incriminating statement from petitioner. In fact, it is fair to infer from the content of petitioner's statement that it was not the non-criminal (at that time) possession of milk sugar and paraphenalia from which he tried to disassociate his friends, but the criminal possession of heroin."

Finally, as to the use of the cutting material and the sugar at trial, the court found in light of petitioner's statement and the other evidence adduced at trial, it was harmless beyond a reasonable doubt.

POINT I

PETITIONER'S FOURTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE ACTIVITIES OF THE POLICE ON OCTOBER 28, 1970.

The major thrust of petitioner's argument on appeal is two-fold, but necessarily related. He argues essentially that all acts subsequent to the discovery of the milk sugar and the paraphenalia were fruits of the "illegal" search and therefore should not have been admitted in evidence. He includes with the fruit. of course, Rios' statement inculpating him, his own statement inculpating himself and of course his own arrest. He argues moreover, that although the police had the right to conduct a full search incident to a lawful arrest, since his arrest was not based on probable cause, the fruits of his supposedly illegal arrest must also be suppressed. These arguments must be dealt with seriatim.

A. The initial entry and seizure of contraband.

The court below was correct in deciding that the initial entry of the police officers on to the premises was perfectly legitimate and consonant with the proper police practice. In United States v. Glassel, 488 F. 2d 143 (9th Cir., 1973), the court upheld the continued viability of Lewis v.

United States, 385 U.S. 206 (1966), to the effect that a law enforcement officer may legitimately obtain an invitation into a house by both misrepresenting his authority and purpose. The Court continued 488 F. 2d at 145:

> "If he is invited inside, he does not need probable cause to enter, he does not need a warrant, and quite obviously, he does not need to announce his authority and purpose."

It is also quite obvious from the cases, that once inside the house he may seize anything in plain view. Coolidge v. New Hampshire, 403 U.S. 443 (1970). Moreover, if he observes illegal transactions which within the scope of his invitation, these may furnish the basis for arrest and the consequent full blown search of the arrested individuals and the area under their immediate control. United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973). It is quite clear therefore, that although warrantless searches are per se unreasonable, the seizure of the five glassine envelopes of heroin and the nine plastic bags, seven of which were ultimately found to contain heroin are clearly justified. Chimel v. California, 395 U.S. 752 (1969); Cupp v. Murphy, 412 U.S. 291, 295 (1973); [search incident to lawful arrest] and under Coolidge v. New Hampshire, supra.

The police having seen a felony committed in their presence had probable cause to arrest both Rios and Moran. In the course of effecting the arrest of Moran the police saw, in open view, and under the immediate control of the arrestees a rather substantial quantity of what they believed to be heroin. Consequently, the seizure of the heroin, and the lactose found on the dresser in open view came clearly within two of the well recognized and narrowly drawn exceptions to the warrant requirement of the Fourth Amendment. Indeed so much is conceded by petitioner.

B. Seizure of the non-contraband.

After the arrest of Rios and Moran was effected, the police subsequently discovered two caches of non-contraband items. The first of these was found in a brown suitcase in the livingroom-bedroom closet, where Moran was arrested. While petitioner argues and the court below held that the search violated the Chimel standards, such is clearly not the case.

In Chimel, supra, the Court held that a search of premises incident to arrest must be limited to the area within the arrestee's immediate control. Chimel, supra, 395 U.S. at 763. The phrase "immediate control" means the area from within which the arrestee might gain possession of a weapon or evidence (Id.). The Court continued:

> "There is no comparable justification however, for routinely searching rooms other than that in which an arrest occurs -- or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." [Emphasis supplied]

The question of what is "within the immediate possession and control" is still an open one, however, at least two circuits holding that the mere fact that the goods seized was in a closet is not sufficient to bring the matter seized outside the scope of permissible seizure announced in Chimel.*

In United States v. Mulligan, 488 F. 2d 732 (9th Cir., 1973), the Court held that the search of the open closet in the room where the defendant was getting dressed, one and a half to two feet away from the bed on which he was sitting. The Court, finding that the closet could have hidden an accomplice or weapon with which to effect the escape, found the search justified.**

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* United States v. Mapp, 476 F. 2d 67 (2d Cir., 1973) is not to the contrary. In that case federal agents forced their way into the apartment and demanded that the occupant produce the narcotics. When the occupant pointed to a closed closet, in the bedroom, the agents searched the closet and found the contraband.

** See also, United States v. Wysocke, 457 F. 2d 1155 (5th Cir., 1972); United States v. Patterson, 447 F. 2d 424 (10th Cir., 1971); Application of Keser, 419 F. 2d 1134 (8th Cir., 1969).

The Court below relied on the fact that at the time the closet was searched, Rios and Moran were already in firm custody and therefore they presented no danger to the police officers, seizing destructible evidence or weapons, however, this is an overly technical approach to the problem and has been rejected by the Court in United States v. Robinson, supra and by the Sixth Circuit in United States v. Lee, 492 F. 2d 744 (6th Cir., 1974), where the Court wrote (at 746):

> "It is true, as Appellant contends, that appellant had been subdued and presented no danger to the police at the time the suitcase was opened. Nor was there the possibility that evidence in the suitcase would be destroyed as the suitcase was under the control of the police. However, the authority to conduct a search incident to an arrest once established, still exists even after the need to disarm and prevent the destruction of evidence have been dispelled."

The record clearly infers that the area within the closet in the bedroom was sufficiently within Moran's control at the time of his arrest to provide a danger that weapons and destructive evidence might be hidden there. The search under the kitchen table was similarly an area within the dominion and immediate control of Rios at the time of arrest and therefore falls within even the narrowed Chimel exception.

Indeed, it moreover appears that the area under the kitchen table where the two cans of lactose were found came also within the purview of the "plain view" doctrine announced in Coolidge v. New Hampshire, supra. The officer was justifiably within the kitchen area when he arrested Rios, and therefore, as the area under the kitchen table, was clearly under Rios' dominion and immediate control when the arrest was effected it was subject to a search incident to arrest. United States v. Robinson, supra; Gustafson v. Florida, supra; United States v. Artieri, 491 F. 2d 440, 443 (2d Cir., 1974):

> "Although in the present case the narcotics were openly on the table, the plain view exception was not the basis for the seizure nor was any attempt made to claim that it was. The purpose of the entry was to arrest those whom the agents has probable cause to believe were in illegal possession of narcotics. The seizure was amply justified by the fact that the contraband was right in front of the defendants, and within their easy reach. It was plainly accessible to them and under their immediate control at the moment they were placed under arrest."

It is clear from the above analysis that the officers were within the "plain view" and "search incidental to arrest" exceptions to the warrant requirement. Therefore the State courts properly derived suppression of the evidence.

C. The five boxes of glassine envelopes and 3-1/2 ounces of heroin

Petitioner argues that the material seized from his person when he was searched should also have been suppressed. He bases the argument on two gounds: first, that the police did not have probable cause; and that any cause that existed was tainted by prior illegally seized evidence. Both these arguments must fail.

The police were informed both on the date of the arrest and two weeks previously, by an "unreliable" informant. That is, there was no indicia of reliability prior to the date Rios and Moran were arrested. Jones v. United States, 362 U.S. 257 (1960); Aguilar v. Texas, 378 U.S. 108, 114 (1964); Giordenello v. United States, 357 U.S. 480 (1958). Of course if the informant had been a reliable one, as his information was based on hard knowledge and not mere speculation, the tip would have furnished the basis for probable cause. However, the issue before the court is whether the informant's tip along with Rios' statement and subsequent events furnished the officer, warranted a reasonable and prudent man in believing petitioner had committed a felony. The standard is set out, as petitioner notes in Beck v. Ohio, 379 U.S. 89, 91 (1964):

> "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

The Courts have emphasized however that the standard is a practical and non-technical one and is not to be judged by the same rather rigid standards as is probable cause for search warrant. United States v. Martinez, 465 F. 2d 79 (2d Cir., 1972); United States v. Lozaw, 427 F. 2d 911 (2d Cir., 1970); United States v. Thompson, 356 F. 2d 216 (2d Cir., 1965), cert. den, 384 U.S. 964 (1966).

Applying this standard to the facts in the instant case, the probable cause requirement was met. At the time of the arrest the police knew that a heroin business was being conducted from the premises, that a person named Jose was in charge of the business, that Jose would be returning to the premises shortly, and that the person they arrested (1) had a right of entry to the apartment; and (2) answered to the name "Jose". Moreover, while at the time of entry the informant's tip was not a sufficient basis for an arrest warrant, because there were no significant indicia of reliability, events subsequent thereto but prior to the arrest sufficiently confirmed the informant's tip so as to make him a reliable informer.

Subsequent events confirmed that someone was selling heroin our of the Grand Avenue address, that only Rios and Moran were there at the time the initial entry was made. The police therefore were entitled to believe when confirmed by petitioner's entry using a key, that petitioner had constructive possession of the drugs found. Therefore, they had probable cause to believe that he had committed a felony and could therefore arrest him for it. Hill v. California, 401 U.S. 797 (1971); Coleman v. United States, 420 F. 2d 616 (D.C. Cir., 1969); United States ex rel. Gonzalez v. Follette, 397 F. 2d 232 (2d Cir., 1968).

Thus, even assuming arguendo that the paraphenalia seized was illegally done so, and although any one particular act of petitioner is consistent with innocence, when all the surrounding circumstances were taken into account, the conclusion warranted was that reached -- petitioner was committing the felony of possession of narcotics. Hernandez v. United States, 353 F. 2d 624 (9th Cir., 1966), cert. den. 384 U.S. 1008 (1966).

D. Petitioner's admission of ownership

Perhaps the most prejudicial evidence in the entire case, aside from the actual heroin, was petitioner's statement that everything in the apartment was his. Petitioner argues that these statements should also be suppressed on the grounds that they too were the product of an unreasonable search and seizure -- specifically he argues that they were the product of both his "unlawful" arrest and of the "illegally" seized paraphenalia.

The assertion of his unlawful arrest claim suffers the same defect as does the seizure of the material found in his pockets. The claim that the statement was the product of the seized paraphenalia is simply incredible and cannot be sustained. Each time petitioner stated that he wished to make a statement, especially the first time, it was not prompted by his seeing the paraphenalia and lactose in front of him, but rather by the concededly properly seized contraband.* It is clear that even assuming arguendo that the seizure of the non-criminal paraphenalia was illegal, the confession was the

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* The record demonstrates that both in the kitchen and the stationhouse, it was the contraband that was in front of him not the paraphenalia, and it was the contraband and cash that he was referring to when he stated that "everything is mines".

product of means sufficiently independent of the so-called fruit, as to not carry with it any taint. Wong Sun v. United States, 371 U.S. 471 (1963); United States v. Wade, 388 U.S. 218 (1967); U.S. ex rel. Robinson v. Zelker, 468 F. 2d 159 (2d Cir., 1972), on remand U.S. ex rel. Robinson v. Vincent, 371 F. Supp. 409 (S.D.N.Y., 1974).

United States v. Schipani, 414 F. 2d 1262 (2d Cir., 1969) relied on by petitioner is inapposite. There this Court found that the two bases for obtaining the same evidence were so inexorably intertwined as to avoid any possibility of untaintedness. In the instant case however, the admission of ownership of the paraphenalia, it not being a criminal offense and therefore neither purging his conspirators nor inculpating himself was virtually meaningless, it was the statement that the contraband was his that served the purpose of inculpating him and exculpating his friends and conspirators. Therefore there is no support whatever for the proposition that petitioner's inculpatory statement was the product of the paraphenalia seized.*

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* There is also some question as to whether the reasonable doubt standard announced by the court in Schipani, supra, 414 F. 2d at 1266, is, in light of the Wade, clear and convincing proof standard, the correct one. United States v. Wade, 388 U.S. at 240; Goldstein v. United States, 316 U.S. 114, n. 1 at 124 (1942) (Murphy, J. dissenting); Nardone v. United States, 308 U.S. 338 (1939).

It is clear therefore, that the evidence seized was come by in a constitutionally permissible fashion, the officers, as the court below noted proceeded "step-by-step" legitimately. Consequently, petitioner's suppression argument must fail.

POINT II

THE USE AND ADMISSION OF THE SEIZED PARAPHENALIA IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT.

Assuming, arguendo that the officers exceeded the scope of the permissible exceptions to the warrant requirement of the Fourth Amendment, and the State Court erred in admitting it in evidence, the record establishes, beyond a reasonable doubt, that such errors were harmless.

Petitioner asserts that because the seized evidence (the paraphenalia and lactose) was circumstantial evidence tending to prove that petitioner had, in fact, constructive possession of the premises (the major issue at trial was, in fact whether petitioner had constructive possession), its admission cannot be considered error, harmless beyond a reasonable doubt. In light of the welter of other evidence in this case, such an argument must clearly be dismissed as specious.

In Chapman v. California, 386 U.S. 18 (1967), the Court first announced the harmless error rule in cases where constitutional rights had been denied. There, borrowing from Fahy v. Connecticut, 375 U.S. 85 (1963), the court held that constitutional error, harmless beyond a reasonable doubt, would

not furnish a basis for reversal. The standard set forth by the Court was "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" 386 U.S. at 23 [Emphasis added]. The Court in Harrington v. California, 395 U.S. 250 (1969) while re-emphasizing the standard set forth in Chapman, supra, stated that the resolution of the question of harmless error must be based on the "probable impact of the . . . [error] on the minds of an average jury" Harrington v. California, supra, 395 U.S. at 254.

In the case of cumulative evidence, two later cases have significantly lessened the standard. In Schneble v. Florida, 405 U.S. 427 (1972), the Court after conducting an independent analysis of the records in the case, found, based on the record as a whole, that because the "'minds of an average jury'" would not have found the case "significantly less persuasive" had the illegal evidence been suppressed, its admission was harmless beyond a reasonable doubt. Schneble v. Florida, 405 U.S. at 432. This same standard was also followed in Milton v. Wainwright, 407 U.S. 371, 372 (1972); See United States v. Adams, 470 F. 2d 249 (10th Cir., 1972).

Perhaps the best statement of the rationale of the harmless (constitutional error doctrine is found however, in United States v. Dougherty, 473 F. 2d 1113, 1127-8 (D.C. Cir., 1973). There the Court noted:

> "The principal characteristic of 'harmless error' doctrine is its result orientation. Its normal operation is in cases where the challenged error concerns a right given a defendant in order to permit his defense to operation at maximum competence or to insulate him from the effects of suspect evidence. In such cases there is reason to consider whether the claimed error is harmless because it plainly did not affect the result adversely to defendant, for then the reason for the right lapses."

In considering whether an error is harmless beyond a reasonable doubt, the courts have focused on two areas: whether the wrongfully admitted evidence was cumulative and whether the case was built on circumstantial evidence or direct evidence. Thus, in Harrington v. California, supra, 395 U.S. at 253-4, the Court found the error of admitting confessions in violation of Bruton v. United States, 391 U.S. 123 (1968) to be harmless beyond a reasonable doubt precisely because the evidence was cumulative in that other direct evidence placed Harrington at the scene, including Harrington's own statement, and because the case was not woven from circumstantial evidence. In contrast, a similar Bruton error was held not to be harmless,

where, absent the confession, the entire case was woven on circumstantial evidence. Fontaine v. California, 390 U.S. 593, 596 (1968).

This Court has also adopted the same view in United States ex rel. Robinson, supra. There a showup conducted without counsel was held not to be harmless beyond a reasonable doubt precisely because, absent the in-court identification, the evidence against the petitioner in the State court was totally circumstantial. 468 F. 2d at 165. See Marshal v. United States, 436 F. 2d 155 (D.C. Cir., 1970); United States v. Johnson, 452 F. 2d 1363, n. 2 at 1365 (D.C. Cir., 1971).

In this case, on the other hand, the jury had before it, the two admissions of ownership of "everything in the apartment" by petitioner, the actual fact that he owned the apartment, evidence tending to show that the occupants of the apartment reacted favorably when presented with the name "Jose" -- petitioner's, and that petitioner had unfettered access to the apartment. In addition the incidental "coincidence" that the heroin seized was enough to make five thousand glassine envelopes worth, the approximate number of envelopes petitioner had on his person when arrested, coupled with the fact that Rios stated she could only supply the officer with fifteen half-loads, tended to show that petitioner was returning from an errand.

In light of all of this, the rather minimal cumulative effect of the narcotics paraphenalia did not, in light of petitioner's admission of ownership of the contraband for possession of which he was convicted and the welter of other evidence extant, contribute to the result in this case. See United States ex rel. Headley, Sams and Huntley v. Mancusi, et al., ___ F. Supp. ___ (S.D.N.Y., Index Nos. 67 Civ. 169, 64 Civ. 2071, 68 Civ. 1728) (Slip Op. at 20, 7/25/74); cf. Wapnick v. United States, 406 F. 2d 741 (2d Cir., 1969); United States v. Levinson, 405 F. 2d 971 (6th Cir., 1968), cert. den. 395 U.S. 958 (1969). The conclusion mandated by the record is the one properly reached by the court below -- if error it was harmless beyond a reasonable doubt.

POINT III

THE RECORD IN THIS CASE DOES NOT SUPPORT PETITIONER'S APPLICATION FOR A HEARING ON THE ISSUE OF WHETHER THE POLICE EXPLOITED PETITIONER'S LOITERING ARREST.

Petitioner, based on nothing more than hypothesis and speculation asserts that it is possible that the police arrested petitioner on a loitering charge as a pretext to gain access to his apartment. Therefore, or so the argument goes, since that arrest was illegal, the fruit of that arrest must be suppressed. The record is devoid of any evidentiary facts to sustain petitioner's assertion that any fruits were seized whatever. Moreover, the record is devoid of any evidence to show that the arresting officers encouraged the arrest or that any evidence was found as a result thereof.

A petition for habeas corpus cannot, as this court has stated, be based on speculation but must allege sufficient facts to make out a constitutional claim. United States ex rel. Ross v. McMann, 409 F. 2d 1016 (2d Cir., 1969), vac. on other grnds, 397 U.S. 759 (1970); United States ex rel. Rosen v. Follette, 409 F. 2d 1042 (2d Cir., 1969), cert. den. 398 U.S. 930 (1970); United States ex rel. Holes v. Mancusi, 423 F. 2d 1137 (2d Cir., 1970). Petitioner having had three opportunities

to delve into the issue, and not even having made a passing reference at either the Huntley or Mapp hearings or at trial itself to any evidence seized, certainly should not, based on the assertion (Pet. Br., p. 24):

> "Although petitioner has not articulated and may be unaware of the evidence the police may have illegally obtained at the time of his arrest for loitering which later contributed to his conviction for possession of narcotics, ... "

order the District Court to inquire (Id):

> "...whether during the four-hour period between the receipt of the informant's tip and the arrest of Rios and Moran the police had petitioner illegally arrested for loitering... ."

The simple answer to petitioner's inquiry is that the informer's tip stated at 12:30 p.m. that the informer had seen petitioner enter a "four-eight" radio car, after having been arrested.*

Consequently this claim, like the prior ones, should be dismissed.

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* Moreover, it should be noted that petitioner's reliance on United States ex rel. Newsome v. Malcolm, 492 F. 2d 1116 (2d Cir., 1974) may be misplaced as it should be noted the Supreme Court will consider Newsome in the October, 1974 Term. Cert. granted sub nom. Lefkowitz v. Newsome, 42 U.S.L.W. 3685.

CONCLUSION

FOR THE REASONS STATED ABOVE,
THE DECISION SHOULD BE AFFIRMED.

Dated: New York, New York
September 9, 1974

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent herein. On the 9th day of September , 1974 , she served the annexed upon the following named person :

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299 Park Avenue
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Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
9th day of September , 1974

Assistant Attorney General
of the State of New York